OmbudsmanSA

Determination

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

Applicant	**Mr Peter Derbyshire (obo Medibank Private Limited)**
Agency	**Central Adelaide Local Health Network**
Ombudsman reference	**2016/08100**
Agency reference	**CALHN/FOI/1516/023**
Determination	**The determination of the agency is varied.**

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) the applicant[1] requested access from the agency:

> … in relation to purchases of prostheses devices over the period July 2015 – December 2015 in the following categories:
>
> Prostheses categories:
> - Interventional cardiac devices
> - Electrophysiology cardiac devices
> - Orthopaedic devices
>
> ...
> In relation to orthopaedic devices our interest is specifically prostheses that are used in hip & knee surgical procedures. However, we are happy with a broader range of orthopaedic devices if that's easier to provide.
>
> Information requested:
> - Vendor name
> - Invoice total
> - Amount (excl GST)
> - Net sum
> - Tax code
> - Tax rate
> - GST
> - Gross amount
> - PO Variance
> - Goods/ Service description
> - Qty Ordered
> - Qty Received
> - Qty Invoiced
> - Unit price
> - Vendor product code.

[1] References to the applicant in these reasons will include the applicant's representatives.

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> … Once we have received this we would expect to come back to you to nominate a small number of sample invoices and/or purchase orders to be provided to us that we might validate the data provided…[2]

2. The applicant subsequently narrowed the scope of his application to exclude vendors' names (**the narrowed application**).[3]

Background

3. The price paid by a private health insurer for prostheses provided to privately insured patients in either a private or public hospital is set by the Prostheses List (**PL**). The PL is regulated by the Commonwealth Government.

4. In February 2016 the Commonwealth Department of Health established the Industry Working Group on Private Health Insurance Prostheses Reform (**IWG**)[4] 'to examine opportunities for reform of the arrangements governing prostheses and devices access in the private health insurance sector'. This was done with a view to implementing the IWG's recommendations as part of the August 2016 Prostheses List.[5] In so doing, the Commonwealth Government acknowledged that:

> Currently, the Federal Government sets a fixed-price benefit that private health insurers are required to pay on behalf of their members for over 10,000 internal medical devices through the Prostheses List Advisory Committee (PLAC).
>
> This in stark contrast to the public system, where there is no set price and greater competition around purchasing, meaning private health insurers are often paying twice as much for medical devices, which is then passed on to patients through higher premiums.[6]

5. In its final report (**the IWG report**), the IWG noted 'that Prostheses List benefit levels for certain items are significantly higher than prices in the Australian hospital system [with particular reference to Western Australia] and internationally', which gave rise 'to an opportunity to consider a material reduction in benefits for certain items [in particular in the high-cost categories of cardiac, hip, knee and Intra-Ocular Lens Systems], and therefore for reductions in private health insurance outlays'.[7] In reaching this conclusion, the IWG reasoned that these categories 'have large volumes and benefits paid, with relatively high levels of competition among prostheses sponsors'.[8] The IWG also recommended that consideration be given to 'legislating a price disclosure

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2 It appears that the applicant liaised with an agency officer to identify classifications and categories used in, and able to be extracted from, the agency's database. It is my understanding that the applicant has not requested any sample invoices or purchase orders.

3 This occurred during a discussion between officers of the agency and the applicant on 18 July 2016, and confirmed in an email from the agency to the applicant on 19 July 2016. My Office subsequently confirmed this also in emails between one of my legal officers and the applicant dated 27 March and 28 March 2017.

4 The membership of the IWG included representatives from the medical devices industry, hospitals, consumers, private health insurers, medical professional and the Department of Health (Cth). See Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 3 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017).

5 Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 1 & 12 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017).

6 Hon Sussan Ley MP (former Minister for Health and Aged Care (Cth)), Prostheses reform a priority for cheaper health premiums (5 February 2016) (available at http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2016-ley007.htm accessed April 2017).

7 Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 3 & 7 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017).

8 Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 3 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017).

system'.[9] It considered that in the longer term, price disclosure would enhance competition and put downward pressure on private health insurance premiums, referring to similar experiences with the Pharmaceutical Benefits Scheme.[10]

6. The IWG was conscious of the 'general lack of transparency in the current listing arrangements', commenting that it:

> … mitigates against a true understanding of the market for prostheses on the PL, and most likely hides significant systemic issues such as cross-subsidisation between private and public health systems, the use of 'loss leaders' to generate market share, and the use of incentives for hospitals and surgeons. This inherent opacity also means that legitimate costs which should be included in a PL benefit, cannot be reimbursed appropriately.[11]

7. On 19 October 2016, the Minister for Health and Aged Care announced that the minimum cost set by the Prostheses List would be reduced by '10 per cent for cardiac devices and intraocular lenses and 7.5 per cent for hip and knee replacements from 20 February 2017', thereby reducing insurers' costs by $86 million in the first year.[12]

8. On 21 November 2016, the Senate referred the matter of 'price regulation associated with the Prostheses List Framework' to the Senate Community Affairs References Committee (**the Senate Committee**) for inquiry and report,[13] with particular reference to, *inter alia* 'the cost of medical devices and prostheses for privately insured patients versus public hospital patients and patients in other countries.'[14]

9. Medibank Private Limited made one of a number of submissions to the Senate Committee.[15] The report was issued in May 2017 (**the Senate Committee report**).[16]

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[9] Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 1 and 7 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April and October 2017).

[10] Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 3-4 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017). A consultant subsequently provided a comparative analysis of benefit setting models. This is referred to in The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 50-51 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[11] Industry Working Group on Private Health Insurance Prostheses Reform, *Final Report* (31 May 2016), 6 (available at https://www.health.gov.au/internet/main/publishing.nsf/Content/9D58D83E645F9CCECA258020000159B7/$File/Final%20Report%20of%20the%20Industry%20Working%20Group%20on%20Private%20Health%20Insurance%20Prostheses%20Reform.pdf accessed April 2017).

[12] Hon Sussan Ley MP, then Minister for Health and Aged Care, 'Turnbull Government to ease pressure on private health insurance premiums' (Media Release, 19 October 2016) 1, available at http://www.health.gov.au/internet/ministers/publishing.nsf/Content/CA690A7F61CE40B3CA2580500079FA6B/$File/SL075.pdf (accessed 11 April 2017), referred to in The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 13 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[13] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework (accessed 22 March 2017).

[14] The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 2 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[15] See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Submissions (accessed 22 March 2017).

[16] The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

10. The Senate Committee report included a number of recommendations with a view to improving transparency and reducing the cost of prostheses. In so doing, it noted that the complex nature of stakeholder relationships and the operation of the PL are such that 'no-one has a complete understanding, and no-one has a complete dataset'.[17] The Senate Committee also commented that:

> Where a private patient receives treatment in a public hospital, the public hospital is able to access prostheses at a much lower price and invoice the private health insurer for the higher minimum benefit amount on the PL.
>
> A patient's private health insurer is required by law to pay the minimum benefit amount for any prostheses included on the PL, regardless of the price paid by the hospital for the device ['This means the hospital receives the full PL price even if the hospital has only paid a part of the price and received the remainder as a discount or rebate.'[18]]. The price of prostheses are [sic] passed on to consumers through health insurance premiums and indirectly to government through the private health insurance rebate.[19]

11. The Senate Committee expressed concern about the often significantly higher prices paid by private health insurers for prostheses than those paid by public hospitals and comparable international markets.[20]

12. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

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

Provisional determination

14. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 8 November 2017. I informed the parties that, subject to my receipt and consideration of submissions from the parties, I proposed to vary the agency's determination to enable the documents to be released after redacting the information in columns 4 to 6, 10, 11 and 16 concerning interested parties 4, 7, 11, 12, 16 and 24.

15. By email dated 14 November 2017, my Office informed the applicant and two of the interested parties of my provisional view that column 9 is also exempt with respect to interested parties 4, 7, 11, 12, 16 and 24, given that it would enable the calculation of pricing information contained in columns 4 to 6, 10, 11 and 16.

16. The agency advised that it had no further submissions to make in response to my provisional determination.

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[17] Submission of the Deputy Secretary, Department of Health (Cth), cited in The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 23 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[18] The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 62 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[19] The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 4 (see also at 17) (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

[20] The Senate, Community Affairs References Committee, *Price regulation associated with the Prostheses List Framework*, May 2017, 61-62 (available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ProsthesesListFramework/Report (accessed 17 October 2017)).

17. The applicant and some of the interested parties provided submissions in response. I have considered these submissions in this determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.[21]

19. 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.

20. The agency claims that the documents are exempt as documents affecting business affairs (clauses 7(1)(a) and 7(1)(b)), documents the subject of secrecy provisions (clause 12(1)),[22] and documents containing confidential material (clause 13(1)(a)). Some of the interested parties have also raised clauses 7(1)(c) and 13(1)(b).

21. The following exemption clauses are relevant to my external review:

Clauses 7(1)(a), 7(1)(b) and 7(1)(c) of Schedule 1 to the FOI Act

(1) A document is an exempt document–

(a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or

(b) if it contains matter–

(i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and

(ii) the disclosure of which–

(A) could reasonably be expected to destroy or diminish the commercial value of the information; and

(B) would, on balance, be contrary to the public interest; or

(c) if it contains matter-

(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.

Clause 12(1) of Schedule 1 to the FOI Act

A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

Clauses 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act

(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.

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[21] *Freedom of Information Act 1991*, section 12.

[22] The agency has not specified the relevant offence provision(s) relied upon, however.

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

23. 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

Documents 1 and 2

24. The agency identified two documents within the scope of the application:
    - Document 1 – Cardiac devices (13 pages)
    - Document 2 – Orthopaedic devices (34 pages).

25. The documents are in the form of spreadsheets, consisting of 17 columns and multiple rows. The columns reveal the following headings:[23]
    1. Vendor Name
    2. Invoice Number
    3. Invoice Date
    4. Invoice Total
    5. Amount (ex GST)
    6. Net Sum
    7. Tax Code[24]
    8. Tax Rate[25]
    9. GST
    10. Gross Amount
    11. PO Variance
    12. Goods/Service Description
    13. Qty Ordered
    14. Qty Received
    15. Qty Invoiced
    16. Unit Price (net)
    17. Vendor Product Code.

26. The documents were created using information extracted from the agency's 'Invoice Procurement Monitor, (Basware Invoice Processing This Client) that lists all general ledger transactions i.e. all invoices received by the Royal Adelaide Hospital …'[26] That said, the agency concedes that there may be issues with the data 'as there are many coding issues with prosthetics being charged to the wrong account code via the Catalogue or through manual coding.'[27] Some of these issues were confirmed during the course of my review.[28]

27. By determination dated 16 September 2016, the agency determined to release document 2 in part. It released information concerning interested parties 14, 15, 18, 19 and 23 contained in columns 2 to 17.[29] It claims that the residual information in document 2, along with document 1 in its entirety, are exempt.

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[23] The full title of each heading is not always visible on the printed versions of the documents provided to my Office.
[24] This column merely reveals whether the product attracted GST or not.
[25] This column merely reveals the percentage of GST payable, if any.
[26] Letter from the agency to Ombudsman SA dated 3 August 2017.
[27] Internal agency emails dated 2 February 2016 and 7 June 2017.
[28] Email from agency to Ombudsman SA dated 4 December 2017. See my discussion concerning the rows relevant to interested parties 27 and 32, below.
[29] I note, however, that the agency appears to have omitted four rows relevant to interested party 23 from page 1 of document 2 (between half and two thirds of the way down the page). These should be provided to the applicant.

Column 1

28. In my view, column 1 in both documents is outside the scope of the narrowed application, and therefore my external review. Accordingly, I will exclude column 1 from further consideration.

Rows relevant to interested parties 27 and 32

29. Interested parties 27 and 32 have claimed that the information concerning them in the documents under review relates to consumables rather than prostheses. I will therefore consider whether or not such information is outside the scope of the narrowed application.

30. The applicant has sought access to information about the purchase of prostheses devices in three categories.

31. Prostheses is the plural of prosthesis. The Macquarie Dictionary defines the word 'prosthesis' as follows:

> 1. the addition of an artificial part to supply a defect of the body.
> 2. such a part, as an artificial limb.[30]

32. The Prostheses Lists that applied during the latter half of 2015 are also useful guides.

33. Only one row in document 2 concerns interested party 27. Interested party 27 submitted that no part of the listed product 'is implanted into or otherwise left inside a patient' and is not included on the Prosthesis List. Having regard to the description of the product in document 2, along with written submissions provided by interested party 27, and information available on its website and other websites located via Google searches,[31] I am satisfied that the listed product is not a prosthesis.

34. Information relevant to interested party 32 is set out in eight rows in document 1. Within those rows, columns 11 to 17 (inclusive), including the 'Goods/Service Description', do not contain any information. As a result, my Office sought further information from the agency. By email dated 4 December 2017 the agency confirmed that the products to which the invoices related were consumables costed to the wrong account, and not prostheses. The agency provided a sample invoice, which refers to a 'standing order', dated 6 March 2015 to support this claim. The agency explained that after transferring to a new system (Oracle) 'it was all going to the wrong department/account code (prosthetics not consumables) … [which] took a while to sort out'. I accept that the invoices listed in document 1 relate to products that are not prostheses.

35. Accordingly, I am satisfied that the information relevant to interested parties 27 and 32 is outside the scope of the narrowed application and therefore my external review. I intend to exclude it from further consideration.

Conclusion

36. For the purposes of my external review, documents 1 and 2 are in issue, apart from:
- column 1 in both documents
- the rows relevant to interested parties 27 and 32
- the information the agency has disclosed from document 2

(**the information in issue**).

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[30] Macmillan Publishers Australia, *Macquarie Dictionary*, 2017, available at https://www.macquariedictionary.com.au (accessed 4 December 2017).

[31] Searches conducted via https://www.google.com.au on 4 December 2017 using the information in the 'Goods/Service Description' column, correcting the typographical error in the second word.

Contracts and agreements

37. On 13 January 2017[32] and 15 May 2017 the applicant raised the possibility that contracts and agreements with the interested parties were arguably within the scope of the narrowed application and therefore my external review.

38. On 5 June 2017 the applicant advised that, having regard to the terms of the access application and communications with the agency that underpinned it, he:

> does not therefore press the point that the request actually extended to cover the contracts themselves. It was, rather, a request for the provision of information that might be extracted from a database or databases available to the hospital for the issuing of purchase orders regarding prostheses and that would also record such orders as had been made.[33]

39. The agency is of the view that the contracts and agreements are outside the scope of the access application. In forming this view, the agency referred to the detailed discussions underpinning the access application. In addition, the agency noted that there was provision in the access application for the applicant to come back to the agency 'to request a small number of sample invoices in order to validate the data requested', but advised that to date he has not done so.

40. Having regard to the applicant's and the agency's submissions dated 5 June 2017 and 3 August 2017, respectively, I do not intend to consider whether or not the contracts are within the scope of the narrowed application.

41. In any event, I do not have jurisdiction to consider the adequacy of an agency's searches for documents under the FOI Act.[34]

42. I will nevertheless consider the contracts and agreements for the purpose of assessing claims of exemption raised by the agency and interested parties.

Issues in this review

43. It is for me to consider whether the agency has justified its determination to refuse access to the information in issue, or whether there is sufficient evidence before me from which I am able to be satisfied that all elements of the clauses relied on by the interested parties are established.[35]

Submissions

The agency

44. The agency has claimed that the information in issue is exempt in full.

45. In its notice following internal review, the agency provided the following reasons in support of its determination:
    - the 'information directly relates to the commercial relationship between the vendors and the Royal Adelaide Hospital (RAH) … in accordance with pricing and other purchasing terms agreed by all parties'

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[32] The applicant submitted that documents evidencing '*every single instance of the agency having procured a prosthesis from the supplier constitutes a separate contract for the acquisition of that prosthesis*', even in the absence of an ongoing supply agreement, would fall within the scope of the access application.

[33] Email from the applicant to Ombudsman SA dated 5 June 2017.

[34] *El Shafei and Central Adelaide Local Health Network* [2017] SACAT 5 (13 April 2017), available at http://www5.austlii.edu.au/au/cases/sa/SACAT/toc-E.html.

[35] *Re Pope and Queensland Health* (1994) 1 QAR 616, [17].

- vendors 'objected to the release of information … [because] the information is commercial in confidence and exists as a result of supply arrangements by the vendors and RAH' (some vendors objected to the release of all of the information in the documents; others only objected to the release of their name)
- disclosure of information in the documents about the vendors:

  > could destroy or diminish the commercial value of the information and cause substantial harm to the vendor's [sic - vendors'] positions in relation to their competitors. The provision of medical devices to public health services is a highly competitive market and the vendors enter into commercial transactions with RAH with the understanding that the information is commercial in confidence between [them]…
  >
  > … the … information is commercially sensitive business information related to commercial transactions between the vendors and RAH and if released would be in contradiction to the SA State Procurement Board, Probity and Ethical Procurement Guidelines [sic; **the Guideline**[36]] and therefore the State Procurement Act 2004 [**the Procurement Act**]
  >
  > Disclosure of the documents would render significant competitive disadvantage to the vendors and could likely hamper the future willingness of those vendors to engage in commercial negotiations with government entities, which on balance would be contrary to the public interest. In our view public interest would not be served by the disclosure of this information only the interests of private entities.

- with reference to the IWG, 'disclosure of the requested information could undermine the ability to continue with the conduct and coordination of the review and would therefore also be contrary to the interests of the public'[37]
- Regarding the public interest:

  > Generally a matter that is in the public interest must be of serious concern or benefit to the public, … any concern or benefit to the public regarding the cost of prostheses to a public hospital … will be addressed by the current federal government investigations and these shared with the public via the normal process.
  >
  > … public interest [also] supports the non-disclosure of documentation … [for example] the public interest in protecting confidentiality, without [which] … the flow of [personal, business and professional affairs] information to and from government agencies would be seriously impeded.

46. In brief submissions to my Office, the agency reiterated both its view that the information is exempt, as well as some of the above submissions. In addition, the agency submitted:
    - There was an agreement in place for the supply of products to the RAH between suppliers and the Minister for Health (SA) from 2007 – 2011. [W]hen this agreement expired it was then rolled over into Blanket Pricing Agreements which was [sic] extended between parties on a yearly basis and expired in November 2016. This led to a tender process at the end of 2016.
    - The pricing agreements/ arrangements form the contractual relationship between the vendors and the RAH.
    - The [consultation] responses … are also confidential …
    - Disclosure of the information … could reasonably be expected to diminish the competitive advantage of a company by providing its competitors with the company's prices of specific goods and providing the competitors with the ability to match or exceed the prices or pricing options.

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[36] South Australian State Procurement Board, *Probity and Ethical Procurement Guideline* (version 1.2), June 2015 (available at http://spb.sa.gov.au/sites/default/files/Probity%20and%20Ethical%20Procurement%20Guideline%20v1.2%20June%202015.pdf accessed 22 March 2017).

[37] I note, however, that the IWG process was concluded before the agency made its determination.

The applicant

47. The applicant has provided detailed submissions and supporting documentation to my Office. I note also the applicant's criticisms of the agency's lack of reasons for refusing access to the information in issue.

48. In November 2016, the applicant made submissions about the claims of exemption under clause 13(1)(a), including that:
    - information drawn from a contract 'can have no greater status of confidentiality than the original version of that information in the contract'
    - 'subsection 13(2) is relevant to an understanding of the confidential status of the information that it contains'.[38]

49. In support of the external review application, the applicant's submissions included the following:
    - 11.3 million Australians hold private hospital insurance
    - 'the existence of a robust and sustainable private health insurance industry is important to overall health policy and to the public health system'
    - '[a]ddressing the inequities of the current prostheses regime for private health insurers is critical in addressing consumers' affordability concerns'
    - the current prostheses pricing regime is 'inherently unfair'
    - for clauses 7(1)(a) *and* 7(1)(b) to apply, each document would need to contain different information that is a trade secret or commercially valuable
    - 'Case law … is remarkably silent in any recognition of *price* itself being a trade secret – at least in other than exceptional circumstances. The present circumstances are not exceptional.'
    - conceding that:
        - acquisition prices could constitute information that has a commercial value to suppliers while it remains confidential
        - 'disclosure of the price could reasonably be expected to diminish or destroy that value'
    - the claim that disclosure of the documents could prejudice parties' willingness to deal with government 'is theoretical …; it indicates a harm that is unproven and potentially remote'
    - 'Private undertakings doing business with government should expect to be subject to a higher level of public scrutiny than in the private sector, including the possibility that their business information could be disclosed to the public under the FOI Act.[39]'
    - competitive disadvantage to suppliers as a result of disclosure of the information will 'not necessarily [be] severe and … will not automatically accrue' because:
        - the agreed prices detailed in the documents are likely based on various factors that 'other buyers may not be able to emulate', or the other buyers may already benefit from similar prices
        - surgeons 'typically decide the type of prosthesis to be used … and clinical and professional considerations and preferences are the primary determiners …, rather than price'

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[38] Clause 13(2) provides that:
A document that is a contract entered into by the Crown or an agency after … [1 January 2005] 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…
I note that the documents under external review are not themselves contracts. It is therefore my view that clause 13(2) is not enlivened.

[39] We adopt the language of this paragraph from recent communications with the Office of the Freedom of Information Commissioner in Victoria, quoting as the basis for this principle *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427 at [477].

- other bodies that reference the minimum benefits regime could also benefit from disclosure of the information when conducting their own purchasing negotiations (for example the Motor Accident Commission (SA) and Return to Work Corporation (SA), and interstate counterparts, and the Department of Veterans' Affairs (Cth))
- examples of prostheses pricing between states and between the minimum benefit amounts and public sector pricing are set out in appendix 2
- disclosure will enable parties to contribute to the current debate around prostheses pricing, and any recommendations made by the IWG and the Senate Committee, on a better informed basis
- the current government initiatives are inadequate to address public interest concerns about prostheses pricing, noting the Senate Committee's broader terms of reference compared with the IWG, and its invitation for submissions from interested parties
- 'confidentiality cannot separately be raised as a point of public interest in the way' claimed by the agency
- 'it is appropriate to apply a higher standard in relation to any person … who is benefiting from a legislative regime and at the same time, seeking to shield information that is relevant to a proper assessment of that regime, while continuing to benefit from the regime itself'
- 'any commercial disadvantage caused by the disclosure only undoes an unfair advantage …'
- clause '12(1) is not a relevant basis upon which exemption can be claimed' here
- only in two scenarios is it even possible for the agency to advance a claim that:

  > information derived from such price sheets and incorporated into a database used by the agency can be said to be information provided in circumstances meeting the requirements of the equitable obligation of confidence and being wholly unrelated to any situation of a contract being in existence. If there is any form of a contract in place, then we consider that subclause 13(2) becomes relevant.
  >
  > … the information in the database … can have no higher claim to confidentiality or exemption than the source information from which it is derived.

- '… commercial arrangements for the acquisition of goods and services undertaken by government bodies should be subject to the higher standard established by subclause 13(2) of the Schedule…'
- the following six public interest factors favour disclosure of the information:
  1. promoting the open discussion of public affairs and contributing to positive and informed debate on issues of public importance:
     - with reference to numerous media articles and Commonwealth-initiated reviews, '[t]he regulation of minimum benefits payable by private health insurers for surgically implanted prostheses is a current topic of public debate and concern'
     - the current rules:

       > have the unintended consequence of effectively setting a price for such prostheses, which is substantially above market price, thereby artificially inflating private health costs. Medibank stresses that those inflated prices are then borne by the privately insured population of Australia via higher premiums and premium increases

     - the public health system will be under greater pressure if private health insurance ceases to be a viable alternative
     - the applicant wishes to contribute to the debate on a properly informed basis, as likely do other organisations, and be able to assess the adequacy of any further changes to the current regime
     - to date the debate has been hampered by access to 'only limited and possibly non-representative examples being referenced'
     - '[t]o the extent … [that the Prostheses List requires higher amounts to be paid than the prices at which the prostheses can be acquired] this

represents an inefficiency the cost of which is largely borne by private health insurers and recovered by them through insurance premiums paid by significant numbers of Australians holding private health cover' and partially by the Commonwealth via the Australian Government Rebate on private health insurance

- 'the larger the number of persons whose interests are affected, the more important the public debate and the more current debate is, the greater the public interest'
- 'prosthesis pricing inefficiency has affected the affordability and the value of private health insurance for the past decade'
- '[p]rostheses represent a significant amount of expenditure, comprising 14 per cent of total reimbursements by private insurers'
- increased prostheses expenditure has been primarily driven by volume rather than price

2. enhancing government accountability and promoting transparency of the effects of government contracting arrangements:

To the extent that the requested documents show that (a) prostheses for private patients are acquired at prices materially below the minimum benefits specified in the Prostheses List, or (b) prostheses prices paid by public hospitals are higher for private patients than for public patients, they will show that the prostheses list prices are:

- having the effect of inflating private health insurance premiums, which compounds affordability challenges for consumers and increases demand on the public health system by those who downgrade or drop hospital cover as a result;
- unnecessarily and artificially high (for private patients); and
- influencing public hospitals to charge artificially inflated prices for prostheses provided to private patients merely because the Prostheses List allows that practice to occur (influencing States to direct that public hospitals charge in this way).

Subsequently, those consequences are unfairly borne by Australians who hold private health insurance.

If the documents show that prostheses can be acquired for public patients at prices lower than those at which they can be acquired for private patients, then they also show either a cross-subsidisation (public health costs) that is again at the cost of privately insured persons or they show that there are value flows being returned to prosthesis manufacturers and hospitals – again, at the cost of privately insured persons. Government contracting arrangements enable these outcomes, so the provision of access to documents that articulate the financial terms of those arrangements will promote Government accountability by enabling the cost incidence of those arrangements to be understood and relevant Government policies.

Separately, any information that shows the prices at which prostheses for public patients in public hospitals can be acquired will be indicative of the prices at which they could be acquired by those same institutions for private patients and at which they may potentially be acquired by large private hospital groups. Thus, the same information will help in identifying the extent to which the current regulatory regime for prostheses benefits payable by private health insurers supports the redistribution of significant value flows, shared between large private hospitals and prostheses manufacturers at the expense of those persons holding private health insurance.

3. informing the public about the operations of agencies
   - such increased understanding will 'enable an understanding of whether (and to what extent) such practices may be contributing to any artificial inflation of the price for prostheses paid by private health insurers, and the flow on effects for health insurance premiums'
   - if the prices for public and private patients are the same, disclosure of the information 'will provide transparency as to whether, and if so then the extent to which hospitals derive a financial benefit from charging private patients at the Prostheses List minimum benefit amounts'
   - if the prices for public and private patients are different, disclosure of the information will show:
     - whether that is an appropriate public policy outcome, in terms of the overall costs of healthcare and the value for expenditure of public money;
     - the extent to which cross-subsidies may exist between private and public patient pricing;
     - whether private patients are charged higher amounts for a device than the cost to the state for supplying that same device to a public patient (i.e. whether there is discrimination based on patient class);
     - … [t]here is a compelling interest in the public having an informed understanding of the prices being paid by State agencies for prostheses included on the Prostheses List so that the public can;
     - understand the combined effect of the minimum benefit rules on State agencies' procurement practices and public hospital charging policies for private patients; and
     - assess whether the Commonwealth's minimum benefit rules are delivering good public policy outcomes
4. ensuring the effective oversight of the expenditure of public funds and 'understanding the sources of public funds … where … there may be cross-subsidisation between the public and private health care systems', bearing in mind that:

   > The South Australian Government, through its relevant agencies, is an important purchaser of prostheses in the Australian market and accordingly there are financial and contractual relationships between the prosthesis suppliers and public hospitals or State purchasing bodies for the acquisition of prostheses for the treatment of public patients and private patients in public hospitals.
   >
   > The close relationship between the parties concerned and the fact that prosthesis suppliers benefit from a Commonwealth-regulated regime that sets a minimum benefit amount payable by private health insurers and a State imposed policy requiring hospitals to charge that same minimum benefit amount warrants a corresponding obligation on the contracting parties to be as open and transparent about the terms of their contractual relationships as possible.

5. promoting open debate on the appropriateness of laws regulating the private health insurance industry, 'particularly the imposition of minimum benefits payable by private health insurers for prostheses.'
6. countering misinformation
   - with reference to a comment made by Susi Tegen, CEO of the Medical Technology Association of Australia:

     > … reported in the Australian Financial Review on 2 June 2016 under the article headed 'health fund claims a bit rich' as asserting that Prostheses List prices had barely risen at all, when … [the issue] is that the Prostheses List prices are gouging privately insured persons.
     >
     > … In the circumstances where a body representing the interests of prostheses suppliers contributes information along these lines it

> becomes unfair to allow those same interests to refuse to disclose information that would refute those same claims or actually support them.

50. The applicant also commented that the agency had not explained the source of the information in the documents, submitting that it 'is essential to a proper assessment' of the agency's claims of exemption under clauses 7 and 13. I note that the agency has since done so. In addition, there is no obligation on the agency to explain the documents under review.

51. On 14 February 2017 the applicant provided an Excel spreadsheet detailing prices for components used in hip procedures in the Western Australian public health system, effective on 1 October 2007, 24 November 2008 and 1 October 2010.[40] Smith and Nephew, Stryker, Zimmer and Johnson and Johnson are listed as tenderers for various products in the spreadsheet. [41] The applicant submitted:

> … that if any of these suppliers are also suppliers for current arrangements in South Australia for Orthopaedic Hip and Knee devices … then the public nature of the WA prices for those same devices is potentially highly relevant … In particular, … the extent of any loss to the commercial value of the information comprised in the requested materials must be minimal…
>
> In addition, because the WA prices … were publically available and almost certainly known to relevant competitors, it must be a far higher bar to reach for a person opposing disclosure of the information we have requested to show that the disclosure would in fact be contrary to the public interest…

52. By email dated 5 June 2017, the applicant made submissions about the relevance of the contracts and agreements. The applicant conceded that to the extent that contracts were signed by the Minister 'there would be implicit approval for any contractual provision regarding confidentiality having been given by a Minister ... in the circumstances referred to in subparagraphs 13(2)(b)(i) and (ii) of Schedule 1 to the *Freedom of Information Act 1991* (SA).' The applicant went on to make a number of comments:

> … I would be surprised if either the terms of the legislation or the jurisprudence developed from it did not have the effect that a non-contract document that is nevertheless *derived* from a contract should have a status for the purposes of the confidentiality exemption that is different from the status of the contract from which it is derived. That would be the same principle as to say that if one particular document is itself an exempt document, then an extract from it or another version of the same information as is in that exempt document would also be exempt. Of course, this principle would go both ways, so if the underlying contract does not have confidentiality exemption by virtue of Ministerial approval of the contract's confidentiality terms, then derivative copies of or extracts of the same ought not to be considered to be confidential either.
>
> …
>
> If the original contract provides for an option to extend being one that is exercisable by either party acting unilaterally (whether or not the other then has a veto power), then I would concede that the original approval of the confidentiality provisions contained in the same would continue during that extended period of operation.

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[40] The document is entitled 'Product_Information__63 (1) - primary hip and knee implants (2012).xls'. On 28 March 2017, the applicant explained that is sourced the document from the :

> …Health Corporate Network (URL: http://www.healthcorporatenetwork.health.wa.gov.au/supply/). However, since mid-2016 and presumably because of a decision by the Western Australian Department of Health, 'health contract' information has no longer been available on this website.
>
> More recently, Medibank obtained the 2012 Orthopaedic contract using a website called 'Wayback Machine' (URL: https://archive.org/web/)…

[41] The applicant also refers to Orthotech as a tenderer. I have not found any references to Orthotech in the spreadsheet provided to my Office, however.

> If the original contract term expires and the parties merely continue by their conduct to act as though it were still in place – much like the overholding of a tenancy – then I would submit that this is not a period during which the original Ministerial approval ought to be considered to continue to operate. This is because there is no evidence of intention by that approver for the approval itself to continue beyond the express term of the contract as originally executed. It would, moreover, equate to an agency assuming upon itself a non-delegated Ministerial power (assuming subclause 13(3) has never been employed) that Parliament has reserved to Ministerial discretion. It would clearly be contrary to subsection 3A(1) of the Act to allow such an informal extension of an arrangement to operate with the benefit of the original Ministerially-approved confidentiality provisions being continued during that time. This is obvious when it is considered that such extensions might be continued indefinitely.
>
> If the original contract term expires or is about to expire and the parties agree to a formal amendment to the contract so as to extend its original term, then this amendment itself is a new contract. Amendments require consideration, certainty, etc. Therefore such a situation also ought to require reversion to the Minister for express approval of the revised terms of the arrangement, else any confidentiality provision contained therein must be construed to have ceased to have Ministerial approval at the expiration of the original term.
>
> (It is, of course, common for contracts to have "survivorship" provisions, denoting particular clauses in them that are to be construed as continuing in effect despite the termination or expiry of the contract. Confidentiality provisions are commonly, though not always, identified as being among the provisions that survive. Should this be the case, the original Ministerial approval would likely be properly construed as itself being ongoing under the same survivorship principles.)
>
> I would respectfully ask that you include a consideration of these issues in your decision-making if relevant contracts, with Ministerial approval for included confidentiality provisions, underpin the information comprised in the CALHN purchasing databases and if those contracts' terms have either expired or been extended in one fashion or another without evidence of supplementary Ministerial approval for the continued operation of those confidentiality provisions.

53. The applicant made brief submissions in response to my provisional determination:

> … We consider that the obligation of confidence in relation to the pricing information is derived from the 'original agreements' [with the Minister for Health (SA) from 2007- 2011] to which the Ombudsman had regard (see [71]). On this basis, we respectfully submit that the obligation of confidence is derived from relevant contracts (and not from the documents that are subject of the application) and as such, subclause 13(2) is relevant to the Ombudsman's consideration.
>
> We repeat our prior submissions in respect of the relevance of subclause 13(2) and that the effect of that subclause is to prevent a claim for exemption being made on the basis of confidentiality where there is a contract in existence unless the contract contains a confidentiality provision and it has been authorised, as required by the terms of the subclause. We also note our previous submission regarding the 'enduring nature' of any Ministerial approval (directly or through delegation) of the 2007-2011 agreement[s] for the purposes of subclause 13(2), and submit that the 'rollover' and subsequent extensions should have different outcomes for the continuing effectiveness of that approval (unless there was 'fresh' Ministerial approval for the new contractual agreements).
>
> For the reasons set out above Medibank considers that Column 9 is not exempt and therefore should not be redacted from the document, alongside and including the remainder of the pricing information.

Interested parties

54. The agency consulted 25 interested parties prior to making its determination (I have numbered them 1 to 25 for ease of reference).[42] The majority of the interested parties objected to some or all of the information about them being released. Some consented and some did not respond to the agency's invitation.

55. I subsequently consulted a further nine interested parties that the agency did not appear to have consulted (numbered 26 to 34),[43] along with those interested parties who had either advised the agency of their objections to disclosure of information concerning them, or not responded to the agency's consultations.

56. Interested parties 2, 5, 8, 12, 14 and 26 are not referred to explicitly in the documents under review. It is unclear why the agency consulted interested parties 2, 5, 8, 12 and 14 in the first place. I understand that when undertaking consultations the agency's FOI staff relied on information from its procurement section identifying potential interested parties, rather than merely the documents themselves. Another interested party submitted that information in the documents concerned interested party 26's business affairs. My Office consulted interested party 26 on this basis.

57. Interested parties 1, 3 to 5, 7 to 13, 16, 17, 20 to 22, 24, 25,[44] 27, 31 and 33 raised objections to disclosure of information concerning them.

Interested parties' submissions to the agency

58. The agency claims that the interested parties' consultation submissions are confidential, as does one of the interested parties. Accordingly, rather than attributing the submissions to specific interested parties who objected to the release of information concerning them (**the information**), I have briefly summarised the majority of their submissions collectively.[45]

59. These interested parties' submissions to the agency, variously, included the following:[46]
    - the documents contain trade secrets
    - a trade secret is 'information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown': *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301
    - prices may constitute trade secrets: *Searle* at [37][47]; *Ridgeway International Ltd v McCullum* (1998) NSWSC 1515
    - the documents contain commercially sensitive/valuable information
    - the interested parties operate in a highly competitive and price sensitive market
    - disclosure of the information will have an adverse effect on them, by:
        - resulting in a disadvantage to them and/or an advantage to their competitors (for example, by weakening their negotiating power in the future or their competitive edge; reducing their ability to compete in the market) (one interested party referred to *Cannon and Australian Egg Farms Ltd* [1994] QICmr 9, and considerations as to whether disclosure of the

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42 This consultation was premised on the agreement between the applicant and the agency not to disclose the vendor's name.
43 *Freedom of Information Act 1991*, section 39(10).
44 Interested party 25 did not respond to the agency's initial consultation attempts. Interested party 25 raised objections during a discussion with an officer of the agency on 23 June 2017, in response to the agency seeking its views about the contracts and agreements. It is unclear from the agency's file note whether interested party 25's objections relate merely to the contracts and agreements, or all information concerning it. I have assumed the latter for the purposes of my external review.
45 The summary of submissions made by interested parties to the agency was included in my provisional determination.
46 The interested parties did not necessarily claim all of the factors referred to in the collective summary.
47 The interested party appears to be referring to *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111; (1992) 108 ALR 163; (1992) 16 AAR 28; BC9203520. I note, however, that in that case the Court commented that whilst financial particulars 'may be confidential … such information may not be a trade secret': *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, 174.

information is capable of causing competitive harm, and a relevant factor being whether the affected party 'operates in a commercially competitive environment in the relevant market')
    - affecting the way current/future negotiations/tender processes are conducted
    - risking a loss of future profits
    - diminishing trust within the industry or damage to public perception of the interested party
- disclosure of the information could reasonably be expected to destroy or diminish its commercial value
- disclosure of the information could prejudice the future supply of information to the government. For example, it could:
    - impact on what offers are made to the government in the future, resulting in innovative proposals and concessions no longer being offered
    - hamper the interested parties' willingness to engage with the government in the future (which may extend beyond the interested parties referred to in the documents)
- redaction of their name would be insufficient to de-identify them given other information that is common knowledge within the industry (for example, brand names and unique identifiers/codes)
- the information is confidential in nature or 'commercial in confidence' (one interested party submitted that the information was also 'derived from other confidential processes and business operations')
- the information was provided in confidence (some interested parties referred to agreements/contracts/dealings/terms of supply, and confidentiality obligations contained within these, to support this claim)
- an equitable obligation of confidence exists if a contractual obligation is discounted (one interested party submitted that a provision in the tender contract made it 'clear … that the pricing material in the … [documents] has always been contemplated by SA Health as being confidential material and/or material that was supplied … in confidence')
- disclosure of the information would be contrary to the *Probity and Ethical Procurement Guideline*[48]
- disclosure of information would found an action for breach of confidence/contract, and give rise to possible claims for damages
- the commercial dealings with the agency were conducted with an expectation of privacy and confidentiality
- the information is not public and is not customarily released to the public
- they have expended time and money researching the South Australian market
- disclosure of the information would undermine the Industry Working Group's ability to conduct its review[49]
- they should not be adversely affected in their business dealings by the operation of the FOI Act: *Re Kimberley Diamond Company NL and Department for Resources and Anor* (2000) WAICmr 51 at [42]
- the competitive nature of the tender process ensures that hospitals and other purchasers seek the best price and terms, which provides sufficient reassurance to patients, consumers and the public as to the expenditure of public monies
- there is no public interest to support disclosure (some interested parties made reference to the work undertaken by the Industry Working Group in this regard)
- there is a public interest in protecting confidentiality
- only private entities will be served by disclosure of the information, and not the public interest

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[48] State Procurement Board, *Probity and Ethical Procurement Guideline* (2015).

[49] This submission is dated 25 August 2016. I note, however, that the Industry Working Group finalised its report well before this date.

- disclosure of the information without other information creates the potential for 'misinterpretation, misunderstanding and misuse' of the information (for example, the information does not disclose the factors behind the prices offered to the agency)
- the amount that private insurers are required to reimburse private patients in public hospitals for prostheses devises is regulated by the *Private Health Insurance (Prostheses) Rules* under the *Private Health Insurance Act 2007* (Cth); the supply price for public patients is irrelevant to these requirements
- one interested party advised that it had gone to 'considerable efforts' to preserve the information's confidentiality.

60. Interested parties 14, 15, 18, 19 and 23 did not object to information about them in the documents being released. The information concerning these interested parties in document 2 previously released by the agency is not in issue for the purpose of my external review.[50]

61. Interested party 2 advised that it did not supply particular prostheses to the Royal Adelaide Hospital during the relevant period.

62. Interested party 6 did not respond to the agency's initial consultation attempts. When the agency sought its views about the contracts and agreements, interested party 6 did not offer its views. Rather, it invited the agency to specify the 'types of information that the FOI claimant requires, we may provide our view regarding confidentiality of that information'.[51]

Interested parties' responses to my provisional determination

63. Of those interested parties who responded to my provisional determination:
    - interested parties 5 and 26 advised that they did not sell prostheses to the agency during the period covered by the access application. This is consistent with them not being referred to explicitly in the documents under review. Interested party 5 nevertheless raised claims of exemption. Interested party 26 advised that it did not intend to take any further action
    - interested parties 27 and 32 submitted that the information concerning them related to consumables and not prostheses. Interested party 27 still claimed that the information relevant to it was exempt, however
    - interested party 21 provided its sales report for the period covered by the access application[52]
    - interested parties 16 and 24 advised that they did not object to disclosure of the residual information referred to in my provisional determination
    - interested parties 7, 9 and 12[53] objected to disclosure of some of the information concerning them
    - interested parties 3,[54] 5, 8, 10, 13, 20, 22, 27, 31 and 33 objected to disclosure of all of the information concerning them.

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50 The four rows relevant to interested party 23 that the agency appears to have omitted from page 1 of document 2 (between half and two thirds of the way down the page) should be provided to the applicant.

51 Email from interested party 6 to the agency dated 16 June 2017.

52 In response, by telephone on 20 November 2017, one of my legal officers spoke to an officer of interested party 21 and advised that my Office was providing it with an opportunity to inform me of its views if it objected to the disclosure of the sort of information set out in the sales report. My officer provided interested party 21 with a short extension of time to advise me of its views. To date, it has not done so, however.

53 Interested party 12 submitted only that the information concerning it in columns 4 to 6, 9 to 11 and 16 was exempt, but did not make any further submissions in response to my provisional determination.

54 Part of interested party 3's response suggests that it only claims that its pricing information is exempt. Elsewhere, however, it refers to the sensitivity of 'product' mix/offer and 'pricing'. Erring on the side of caution I have treated its submissions as a claim of exemption over all of the information relevant to it.

64. In support of their objections, the interested parties reiterated a number of previous submissions. Their responses to my provisional determination included the following submissions:

Interested party 3:

- pricing information ought to be redacted as proposed in my provisional determination for those interested parties who entered into a deed of agreement in 2007
- the agreements 'would have expired in 2013 and hence should not play any consideration in the determination for data from 2015'
- 'if it is deemed that price disclosure will adversely impact the commercial operations of … [those interested parties who entered into a deed of agreement in 2007] as per Item 76 [of my provisional determination], then there are no grounds to exclude … [it] or … any other trading commercial entity covered by the impacts of the release of identified residual data'
- in rebutting the applicant's public interest claims referred to in paragraph 38 (and applied in paragraph 101) of my provisional determination, the applicant's shareholders will be the primary beneficiaries of legislative reform
- selective, 'limited "price" information further exacerbates a limited understanding of a complex industry. Potential commercial motives should therefore be a key consideration for the decision to approve FOI disclosure applications'
- the private health insurance industry's 'political campaign around "false data"' resulting in recent PL benefit reductions makes it more resolute in its objections to disclosure on public interest grounds
- 'there is real commercial-in-confidence value in keeping … [its] price and product offer from our competitors' as the market in which it operates is highly competitive and disclosure would 'seriously' erode its 'ability to compete'

Interested party 5:

- information relevant to its trading arrangement with the agency should be exempt under clauses 7 and 13[55]
- disclosure of information concerning it would enable third parties to 'undermine' its 'legitimate commercial interests'

Interested party 7:

- claiming that, in addition to columns 4 to 6, 10, 11 and 16 (which I provisionally determined to be exempt in relation to it and some other interested parties), columns 1,[56] 9 and 17 should not be released
- it does not object to disclosure of the information in columns 2, 3, 7, 8 and 12 to 15
- with respect to column 9:
  - its standard terms include a confidentiality regime to the effect that its customers:

    > must keep confidential all non-public and proprietary information, regardless of how that information is stored and delivered, including the contract for the supply of products, and any pricing arrangement and discounts

  - disclosure would amount to a breach of both contract and confidence, and would cause it 'substantial harm'

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[55] Interested party 5 did not specify which subclauses it relied upon.

[56] As indicated in my provisional determination, column 1 ('Vendor Name') is outside the scope of the narrowed application. Interested party 7 noted this view, but asked that this be made expressly clear in my determination. In response, I have referred to column 1 in the final paragraph of these reasons.

- disclosure would enable the applicant to 'determine the price per product' and should therefore be treated the same as the other pricing information in columns 4 to 6, 10, 11 and 16 and be considered exempt under clause 13(1)(a)

- with respect to column 17:
  - with reference to its previous submissions to the agency, 'disclosure of the vendor product code would not only make it possible … but extremely likely' that it would be identified as the supplier
  - disclosure of the vendor product code has the same effect as releasing the vendor name

Interested parties 8 and 33:

- claiming that all of the information concerning them is exempt under clauses 7(1)(a), 7(1)(b), 7(1)(c) and 13(1)(a)
- they can be identified from information in columns 12 and 17

Clause 7(1)

- the information concerning them:
  - is a trade secret and confidential
  - not publicly known and not widely known outside of its business
  - understood and treaded by its staff as 'being confidential and commercially valuable'
  - cannot be 'independently duplicated' by their competitors
  - gives them 'an advantage over … [their] competitors while the information remains generally unknown'
  - is commercially valuable to them; 'the retention of the confidentiality of that information is important or essential to the ongoing profitability or viability of supply … of the relevant products to the South Australian public health system'
  - is commercially valuable to their competitors
  - concerns their business, commercial and financial affairs
  - was collected by the agency in the context of a commercial supply arrangement
- disclosure of the information concerning it:
  - could cause them real or significant harm 'through more targeted marketing to the agency … and [competitors] undercutting … [their] pricing'
  - potentially price them out of the South Australian public health system market
  - destroy or diminish the value of the information
  - could adversely affect the procurement outcome by deterring offers from being submitted or information being provided in support of offers
  - could adversely affect their business, commercial and financial affairs
- the risks to them are not removed by the passage of time, particularly as prices and the range of products are current (prices have not changed significantly in recent years)

Clause 13(1)(a)

- a written contract or agreement is not necessary for an equitable obligation of confidence to exist
- the criteria for establishing an equitable obligation of confidence are satisfied, including:
  - they and the agency:

    entered into the supply arrangement on the inferred and mutual understanding that the information in relation to that supply arrangement would be treated as confidential information, and would only be used for the purpose of the supply arrangement
  - this understanding between them and the agency is supported by:

  - their treatment of the information 'as if it is confidential information', as evidenced by the continued supply relationship; the agency's FOI determination; and their willingness to sign a 2017 agreement containing confidentiality provisions ('which merely formalised the confidentiality obligations mutually understood to … [exist] prior (including during the period July 2015 to December 2015)')
  - the State Procurement Board's *Probity and Ethical Procurement Guideline* first issued in June 2015 (a copy of which they provided to my Office) 'which states ethical procurement practices include ensuring measures are in place to manage confidentiality of documents, submissions and commercial information'
  - SA Health's *Probity in SA Procurement Policy Directive* dated 27 September 2017 (a copy of which they provided to my Office) details the 'policy regarding the need to maintain the confidentiality of commercially sensitive information of suppliers', with specific reference to item 3.8
- it is not practicable to apply section 20(4)

Interested party 9:

- the pricing information in columns 4 to 6, 9 to 11, 15 and 16 should be exempt from disclosure
- with reference to its previous submissions to the agency, the pricing information is 'highly confidential and possesses a real commercial value'
- disclosure of the pricing information:
  - is 'reasonably likely' to destroy or diminish its commercial value and therefore adversely affect its business and commercial affairs
  - is 'highly likely' to harm its competitive advantage in the marketplace
  - is 'highly likely' to result in an undue benefit to a third party
  - 'was communicated and agreed in mutual confidence' between it, the agency and the Royal Adelaide Hospital
  - would be contrary to the public interest because events since the access application was made, including changes to the PL arrangements and private health insurance industry, some announced as recently as September and October 2017,[57] 'both diminish any public interest benefit from disclosing ... and strengthen the public interest consideration for exempting the pricing information from disclosure'
  - 'would not assist in informing changes to the PL arrangements and would, in fact, result in inaccurate and misleading comparisons which will not support efforts to improve the value of Private Health Insurance'. In saying this, it referred to the 'stated poor quality of the information[58], the limited number of products and limited number of purchasers that are subject to the information request' and submitted that the:

    > use of limited data points to provide inaccurate and misleading figures … risks large reductions that will significantly impact on the industry and potentially result in Australians with PHI [private health insurance] having to pay gap payments for prostheses or not having access to the latest technology[59]

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[57] Minister for Health media release. 13 Oct 2017… [my Office located this document via http://www.greghunt.com.au/Media/MediaReleases/tabid/86/ID/4390/Major-reforms-to-make-private-health-insurance-simpler-and-more-affordable.aspx (accessed 4 December 2017)]; Agreement between the Government and the Medical Technology Association of Australia (MTAA) - Oct 2017… [my Office located the agreement via http://www.health.gov.au/internet/main/publishing.nsf/content/EE9D7DA6EA42BDE0CA257BF00020623C/$File/Attachment%20to%20MTAA%20letter%20-%20agreement.pdf (accessed 4 December 2017)]; MTAA media release 12 Sep 2017… Available at https://www.mtaa.org.au/news/independent-hospital-pricing-authority-data-medical-devices-apples-oranges; MTAA media release 12 Oct 2017… Available at: https://www.mtaa.org.au/news/medical-device-industry-signs-historic-agreement-reduce-health-funds-premiums.

[58] Paragraph 22 of the Ombudsman's Provisional Determination.

[59] HealthDispatch 14 Sept 2017… Available at https://www.healthdispatch.com.au/news/mtaas-burgess-reform-must-be-backed-by-the-best-data.

- noted the applicant's concession that 'pricing information has commercial value to suppliers while it remains confidential and disclosure … could reasonably be expected to diminish or destroy that value'
- in rebuttal of selected submissions made by the applicant:
  - completion of the IWG and Senate Inquiry means that disclosure will not contribute to the current debate around prostheses pricing
  - 'if agreed prices are based on various factors, and those factors are not evident, this will lead to inaccurate comparisons being made which could result in inappropriate determinations' and 'decision making…'[60]
  - '[i]n the public sector, prostheses are mostly purchased through tendering arrangements with a focus on bulk purchasing and limited range of prostheses available for surgeon use'
- 'the main issue impacting the value and affordability of PHI is not the PL arrangements and the benefits levels for prostheses. There are a whole range of issues that have been considered recently by a number of reviews including the … Senate Inquiry'[61]

Interested party 10:

- all of the information, and the company name,[62] product codes, description and pricing in particular, is 'sensitive'
- access to its pricing structure 'could prejudice the future supply of products to the Hospitals, with regards to competitors finding out our pricing structure and offering lower pricing'
- accepting that if I remained of the view that the information is not exempt, it could be accessed by the applicant

Interested party 13

- all of the information concerning it[63] is exempt as 'a trade secret, commercial-in-confidence and would found an action for breach of confidence'
  Clause 13(1)(a)
- a deed of agreement dated 12 November 2017 existed between it and the Minister for Health which shares the characteristics of the agreements referred to in paragraphs 58 and 59 of my provisional determination, aside from the fact that the initial period was for two years.[64] Accordingly, the obligation of confidence applies equally to it
- release of the information concerning it 'would cause major detriment'
- column 9 should also be exempted under clause 13(1)(a); failure to do so would result in other pricing information being calculable
- disclosure of the residual information in issue, including the information contained in or derived from the invoices, would also found an action for breach of confidence:

> [The information] has the necessary quality of confidence, in the sense that it is not otherwise publicly known. It is also noted that pricing information is generally to be regarded as commercially sensitive and therefore treated as 'commercial-in-confidence' in any commercial agreement. An invoice contains information derived from the pricing information and can also be characterised as information from

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60 MTAA media release. 15 Sep 2017… Available at https://www.mtaa.org.au/news/medical-device-industry-welcomes-government-response-senate-inquiry.

61 Senate Community Affairs References Committee… Inquiry website available at: https://www.aph.gov.au/sitecore/content/Home/Parliamentary_Business/Committees/Senate/Community_Affairs/Privatehealthinsurance.

62 As indicated in my provisional determination, column 1 ('Vendor Name') is outside the scope of the narrowed application.

63 At interested party 13's request, I confirm that information concerning it is only contained in document 1.

64 The agency requested, and my Office invited, interested party 13 to provide documentation evidencing any agreements between it and the Minister/Department or agency, by emails dated 8 June 2017 and 5 December 2017, respectively. By email dated 15 June 2017 interested party 13 declined the agency's request. By email dated 11 December 2017 it provided a copy of the agreement to my Office.

> which pricing information could ordinarily be discerned even if not overtly stated on its face…
>
> In the circumstances in which an invoice is received … [it] submits that the agency must know that the contents of that invoice are confidential… To suggest that an Agency could receive information, some of which is acknowledged as confidential, and not understand the information was being obtained in circumstances where a reasonable person would know it was secret, is simply incongruous

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

- the residual information/contents of columns 4 to 6 and 9 to 17[65] is a trade secret,[66] commercially valuable and concerns its business affairs
- the listed products 'are sold within a highly competitive marketplace'; it and its competitors 'are constantly attempting to find new and innovative ways to secure a larger market share'
- it has expended considerable 'time and effort over an extended period of time' to determine feasible product strategies
- disclosure of information about its pricing and sales volume:
  - competitively disadvantages it
  - 'destroys the value of the pricing structures'
  - 'indirectly … increases the negotiating strength of other customers'
- 'product vendor codes are found in many price lists and can be easily matched to the relevant products especially by competitors'
- notwithstanding the time that has elapsed and the fact that some of the products sold have changed, the information retains its commercial value and relevance
- disclosure of past pricing would still impact on its ability:
  - 'to negotiate commercially favourable agreements'
  - extract the maximum commercial value for the listed products as it would be 'forced to negotiate from a heavily weakened position' with customers seeking 'to use it as a base position and reference point' (this will be so even in the absence of the bases for the pricing information)
  - 'compete fairly in the market'

  thereby resulting in losses 'both now and into the future'
- it is irrelevant that the prices only refer to the South Australian market
- 'there has not been significant elapsing of time since the residual information was received by the Agency'
- the quantities sold and the supply of particular products to the agency is itself a trade secret and valuable information, the disclosure of which would significantly harm its ability to compete
- accepting that clause 7(1)(b) does not apply if I accept its submissions in relation to clause 7(1)(a)

Public interest

- it is typically considered to mean a matter 'of serious concern or benefit to the public'
- further reductions in the prices paid for prostheses would benefit the applicant but not South Australia or its public health system
- despite the objects of the FOI Act favouring release, disclosure of the information concerning it would, on balance, be contrary to the public interest because:
  - private companies would 'cease tendering, or at the very least pull back from providing the most competitive pricing in South Australia'
  - it would be 'out of step with ordinary commercial principles … [and create' significant commercial uncertainty and risk'
  - it would result in 'tendered pay prices which are much closer to those paid by the private health system'

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[65] Interested party 13 refers variously to the residual information in issue and the contents of columns 4 to 6 and 9 to 17.

[66] In so doing, it drew my attention to '*Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2010) 114 FCR 301, and the Court's reference to "an advantage over its competitors"'.

  - it would prompt considerations 'as to whether to tender for medical devices in Australia without appropriate protection', therefore potentially limiting 'access to valuable healthcare resources for Australians' (Australia representing a very small part of the global market)
  - 'one or more exemptions … [containing] a public interest test have been satisfied'[67]
  - of the high ongoing relevance of the information in light of its commercial sensitivity, its relative recency, and the limited information in the public domain
- the ongoing Parliamentary and public debate on the issue, and the applicant's contribution to it, 'can occur without the need to divulge confidential and heavily protected information'
- '[t]he price set by the Prostheses List is determined by a number of factors … [and is itself] a determination by market forces'
- there is nothing to preclude private hospitals negotiating lower prices
- the objects of the FOI Act 'are clearly directed … to the good government of South Australia and to the accountability of the Ministers to the State and the Crown in right of the State'
- public interest considerations ought to focus on benefits and impediments to South Australia 'first and foremost'
- 'enhancing government accountability typically relies on ensuring that Government is achieving value for money… The applicant is not seeking to hold the Agency accountable for its own spending', but to lower prices and reduce its cost base

Interested party 20

- all of the information concerning it is exempt under clauses 7(1)(a), 7(1)(b), 7(1)(c), 13(1)(a) and 13(1)(b)

Clause 13(1)(a)

- contrary to my provisional determination, it entered into a deed of agreement with the Minister for Health on 15 June 2007[68] which was then extended formally or on a 'rolling basis' until 1 March 2017, on the same terms and conditions as the deed of agreement. The deed of agreement excepted disclosure of pricing information
- even if such deed of agreement did not exist, I did not adequately consider whether the residual information in issue imported an obligation of confidence in the requisite sense
- information concerning it satisfies the criteria for importing an equitable obligation of confidence. In particular:
  - with the exception of the information in columns 12 and 17, it has the necessary quality of confidence, not being common or public knowledge and access restricted to the agency and within its business
  - it was received in circumstances which import an obligation of confidence:
    - as part of a confidential tender process:

> Procurement by SA Health has always been conducted on the mutual understanding that pricing information in a tender will be kept confidential and … [it] provided the … information in reliance on that understanding… [T]he Better Customer Charter for Business, which sets out what suppliers can expect from the South Australian Government when they bid for procurement opportunities, expressly provides that 'We will treat commercial information provided as confidential'. Unlike other industries, in this industry, there is not public opening of tenders…

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[67] Interested party 13 referred to the State Records' guideline, *FOI and the Public Interest*, available from https://government.archives.sa.gov.au/sites/default/files/20150703%20FOI%20and%20the%20Public%20Interest%20Final%20V2.1.pdf (accessed 11 December 2017).

[68] Interested party 20 subsequently provided a copy of the deed of agreement.

        - disclosure of columns 7, 8 and 9 and 13, 14 and 15 would reveal information in columns 5, 6 and 16
        - disclosure of columns 12 and 17 along with pricing information would enable it to be identified
    - disclosure would have a negative impact on its commercial interests

Clause 13(1)(b)

- information concerning it was obtained in confidence
- disclosure might reasonably be expected to prejudice the future supply of such information to the Government or an agency by affecting its willingness 'to provide such highly sensitive and commercially confidential information'

Clause 7(1)

- the pricing information is only two years old and 'not dissimilar' to the current prices for its products
- it is wrong to assume that the prices relate only to the South Australian market
- disclosure of the information concerning it:
    - would cause it real or significant harm by enabling competitors to undercut its pricing, thereby reducing its competitiveness
    - will have 'wide ranging ramifications' for it given its relative size in the marketplace
    - will disclose its pricing strategy
    - 'would not only destroy or diminish the commercial value of that information; it would completely extinguish it'
    - could reasonably be expected to have an adverse effect on its affairs or prejudice the future supply of information to the Government or an agency
- the 2017 agreements are irrelevant to the question of whether disclosure would cause real or significant harm; '[i]f confidential information provided in reliance on the 2007 agreement can be released under the FOI Act, it follows that there is no guarantee or comfort that the 2017 agreement would avoid the same result'
- the expression 'could reasonably be expected to' means 'a real possibility but not a certainty'

Public interest

- disclosure would, on balance, be contrary to the public interest as it would
    - reduce competitiveness within the market, including by undercutting prices
    - prompt some suppliers to withdraw from segments of the market
- in my provisional determination, I did not weigh or balance the public interest factors in any comparative analysis

Interested party 22

- all of the information concerning it is exempt under clauses 7(1)(a), 7(1)(b), 7(1)(c), 13(1)(a) and 13(1)(b)

Clause 7(1)

- 'in commerce prices, pricing information and the basis on which prices are calculated can constitute trade secrets'[69]
- the information concerning it 'contains confidential pricing information' which is 'amongst its most commercially sensitive information'
- it 'operates in a complex and competitive business environment'
- its pricing information:
    - incorporates 'detailed technical calculations and analysis' and 'competitive intelligence'
    - 'is a trade secret … used in the business'
    - is not accessible to the public and is restricted to authorised users
    - and other information concerning it, was provided to the agency 'on a commercial-in-confidence basis … in response to a request for proposal'
    - continues to be subject to confidentiality

[69] *Searle* at [37]; *Ridgeway International Ltd v McCullum* (1998) NSWSC 151.

- disclosure of the pricing information:
  - could be used against it by competitors and cause it real harm and competitive disadvantage, including by enabling competitors to undercut its prices (in saying this it disputed the factors referred to in paragraph 83 of my provisional determination, particularly the time that has elapsed, noting the currency of the information concerning it)
  - would inevitably result in competitors obtaining its pricing
  - would provide insight into its strengths and weaknesses and its commercial strategies
  - could reasonably be expected to destroy or diminish the commercial value of the information and have an adverse effect on its business and commercial affairs
  - could result in 'unwarranted reputational and business damage', for example by enabling others to make simplistic comparisons and unjustified criticisms of the pricing information taken out of context
  - would result in it taking a more cautious approach with respect to future proposals (if it decided to participate at all), and make it 'more likely to submit price proposals that were more generic and less competitive and may omit key products' thereby prejudicing the supply of information to the agency
- there is a growing demand for products and a number of suppliers to meet this demand; in part, this competition drives innovation in the market
- it expends 'significant resources' preparing proposals for the public health sector, often over weeks or months and involving multiple teams across its business before submitting them to the customer
- the current tender process 'provides a level playing field and obliges each party … to develop the most competitive proposal it can without the benefit of knowledge of its competitors' proposals'

Clause 13(1)

- it has satisfied the criteria to establish an equitable obligation of confidence over the information relating to it, or at least its pricing information, and it should be treated consistently with the interested parties referred to in paragraph 71 of my provisional determination
- it has satisfied the elements of clause 13(1)(b)

Public interest

- there is not a general public interest in the information concerning it; rather:

  > it would only be of interest to limited individuals who are likely to include competitors and health insurers such as Medibank which has its own commercial interests … of maximising profitability for the benefit of its shareholders

- '[t]he exemptions necessary for the protection of "personal affairs" and "business affairs" … are themselves … public interest considerations'[70]
- disclosure would be contrary to the public interest because:
  - the information was provided to the agency on a confidential basis
  - disclosure would affect its business and professional affairs[71]
  - the pricing information remains current and its dissemination is limited and not publicly available
  - it may result in it not participating in future tender processes with the government or offering 'more generic and less competitive' proposals

Interested party 27

- information relevant to it, in particular its pricing information, is exempt under clause 13(1)(a), such information being confidential and not published or otherwise known to third parties

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[70] In so doing, interested party 22 cited *Colakovski v Australian Telecommunications Corporation* [1991] FCA 152, per Lockhart J.

[71] Again with reference to *Colakovski v Australian Telecommunications Corporation* [1991] FCA 152, per Lockhart J.

- the price it charges can vary depending on the applicable arrangement and is 'commercially sensitive confidential information which would be of value to … [its] competitors', of which it has a number
- '[p]ricing information has been recognised as inherently confidential … (see for example *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317… and *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117…)
- an express obligation of confidence, such as a contractual term, is not a pre-requisite in order for 'confidential information to be protected'. 'The circumstances of the supply of that information may, and in this case do, impose an obligation of confidentiality (see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 …)'
- 'the agency was aware that the information was not freely available at the time it negotiated a price'; the agency's determination evidences its understanding that the information is confidential
- There is no public interest in favour of disclosing the information relevant to it, particularly as the listed product is not a prosthetic device:

> … there is a general expectation that negotiations for contracts are private and that where the terms are not otherwise public, that those terms will not in fact be made public or relevantly, to competitors. While such information may be valuable to a competitor, this does not mean that it is in the public interest for some competitors to be able to obtain the information of other competitors by means of an FOI request. To the contrary, that would subvert the purpose of the FOI Act, bring it and the law into disrepute and would impose an unreasonable burden on agencies, which would need to comply with those requests at the expense of performing other services for the public

Interested party 31

- the information clearly concerns its 'business, commercial and financial affairs' and is exempt under clauses 7(1)(b) and 7(1)(c)
- the product code will identify it
- 'the pricing information relates to products supplied not only to the agency and, although two years old, not so old as to have no commercial value'
- it 'had a reasonable expectation of privacy and confidentiality in the commercial dealings to which the information relates'
- disclosure of commercially sensitive and valuable information, including pricing information, under the FOI Act:
  - presents the 'very real likelihood' that it and similar companies 'will be less inclined to supply to an agency when its products are also in demand by private customers'
  - is likely to 'reduce or destroy its commercial value' by disadvantaging it and/or advantaging its competitors in the highly competitive and price sensitive market in which it operates.
- de-identifying the invoice information may reduce the potential damage to it, but the 'pricing information cannot be de-identified and will be clearly identifiable by product code' as its product.

Consideration

Clause 12(1)

65. The agency has not referred to a specific offence provision in support of its claim that the documents are exempt under clause 12(1). Rather, it has submitted that disclosure of the documents 'would be in contradiction to the' Guideline and the Procurement Act.

66. Clause 12(1) of Schedule 1 to the FOI Act applies if a document 'contains matter the disclosure of which would constitute an offence against an Act.'

67. Non-compliance with the Guidelines or the Procurement Act does not give rise to an offence, however.

68. In my view, the agency's reliance on clause 12(1) of Schedule 1 to the FOI Act is therefore misguided.

69. I am not satisfied that the documents are exempt under clause 12(1).

Clause 13(1)(a)

70. The agency and a number of the interested parties claim that disclosure of the information in issue would found an action for breach of confidence.

71. In support of this claim, they have provided various contracts and agreements. The arrangements between the Government and those interested parties who have raised objections differ. Briefly stated, they fall into the following categories, namely those:
    - with a deed of agreement entered into in 2007 (interested parties 4, 7, 11, 12, 13, 16, 20 and 24)
    - with agreed price lists with the agency, without formal confidentiality arrangements (interested parties 1, 3, 5, 6, 9, 21, 22 and 26)
    - with a consignment agreement, without formal confidentiality arrangements (interested party 10)
    - without a relevant agreement or price list (interested parties 8, 17 and 25[72]).

72. There is insufficient evidence before me to ascertain which of the above categories, if any, interested parties 27 to 34 fit into. That said, there is no evidence before me that they had entered into a deed of agreement with the Minister for Health, or otherwise had formal confidentiality arrangements with the Minister, the Government or the agency prior to January 2016. I have treated interested parties 27 to 34 accordingly.

73. Briefly stated, there are two different versions of deeds of agreement (**the original agreements**) relevant to interested parties 4, 7, 11, 12, 13, 16,[73] 20 and 24.[74] They share some similarities, however. The original agreements:
    - are between the Minister for Health and the relevant interested party
    - were entered into in 2007
    - were signed 'for and on behalf of the Minister for Health'[75]
    - provide for an initial period of up to three years[76]
    - include provisions to extend the contract for up to three years.

74. The contracts relevant to interested parties 4, 11, 12 and 13 preclude the parties to the agreement from using 'any Confidential Information of the other party except as genuinely and necessarily required for the purpose of this Agreement', with only limited exceptions (clause 18). They include a survivorship clause relevant to confidential information (clause 18.5). 'Confidential information' is defined to mean (clause 1.1.5):

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[72] The agreement provided in relation to interested party 8 is both unsigned and appears to post-date the period covered by the access application (it refers to a 2020 expiry date). With respect to interested party 17, the agency has confirmed that there were no contracts or price lists in place for the relevant period. I have received no evidence of any contracts or agreements with interested party 25.

[73] I have not received a copy of the 2007 contract relevant to interested party 16. That said, based on a 2010 extension and variation agreement provided to my Office, which specifically refers to a 2007 agreement, I am satisfied that such an agreement was entered into with interested party 16.

[74] Although I note that a number of interested parties raised objections to disclosure of the agreements they had entered into, it is apparent that the agreements themselves specifically provided for disclosure of:
- the agreement and/or information in relation to it (clause 17) in the case of interested parties 4, 11 and 12
- the 'Agreement and any Individual Supply Contract … except … Pricing Information'.

[75] The copy of the contracts relevant to interested parties 8 and 11 provided to my Office do not include the signatures of the Minister's representative. I am nevertheless prepared to accept that the contracts were executed by both parties, based on their ongoing relationship and subsequent correspondence.

[76] In 2010, by an extension and variation agreement, the original agreement with interested party 16 was extended for a further 12 months to 2011.

> information disclosed by or on behalf of a party to this Agreement that:
> (a) is by its nature confidential or by the circumstances in which it is disclosed is confidential; or
> (b) is designated by the disclosing party as confidential or identified in terms connoting its confidentiality,
> but does not include information which is or becomes public knowledge other than by a breach of this Agreement or information which is included in this Agreement.

75. The confidentiality obligations appear to be limited to the supplier in relation to the contracts relevant to interested parties 7, 20 and 24 (clause 12). That said, these contracts envisage disclosure of the agreements or individual supply contracts, other than 'pricing information' (clause 20). Relevantly, the agreements include the following definitions:

> 20.3 For the purpose of this clause:
> 20.3.1 "Agreement" and "Individual Supply Contract" include:
> (a) all schedules to this Agreement or an Individual Supply Contract; and
> (b) all documents exhibited or annexed to this Agreement or an Individual Supply Contract; and
> (c) all documents incorporated by reference in this Agreement or an Individual Supply Contract, together with their respective schedules, exhibits and annexures, and
> (d) disclosure may be in either printed or electronic form, either generally to the public, or to a particular person as a result of a specific request.
> 20.3.2 Pricing Information means that information that directly or indirectly describes the unit prices for products listed in Schedule 2 but does not include spending by product aggregated over time and/or customer.

76. Although I have not received the 2007 agreement relevant to interested party 16, I consider it highly likely that it would replicate one of the versions referred to above having regard to a 2010 extension and variation agreement provided to my Office, which specifically refers to a 2007 agreement.

77. It appears that all of the available extension options were exercised, with the original agreements (as extended) concluding in 2012. The relationship with the interested parties nevertheless continued, with various extensions thereafter to:
    - the 'current arrangements'
    - the continued supply under the same terms and conditions (and sometimes pricing).

78. Some of the communications with interested party 7 refer expressly to transactions being subject to their 'Standard Terms and Conditions of Sale', and to discounts and prices being commercially sensitive and remaining confidential. The 'Standard Terms and Conditions of Sale' include an obligation not to disclose 'Confidential Information', which is defined to mean:

> all confidential, non-public or proprietary information, regardless of how the information is stored or delivered, exchanged between the parties relating to … [IP7's] business, technology or other affairs and includes the Contract and any pricing arrangements or discounts discussed or agreed by the parties.

79. Such extensions continued beyond the period covered by the access application. Whilst I note that there are some gaps in correspondence following the original agreements, the relationships with the interested parties appear to have continued without interruption, predicated on the original agreements.

80. To succeed in claiming clause 13(1)(a) as the basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the

disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.[77]

81. The Administrative Appeals Tribunal (**AAT**) has had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),[78] which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.[79] In my view, the AAT decision has persuasive value.

82. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:[80]
    - the information must be capable of being identified with specificity
    - the information must have the necessary quality of confidence
    - the information must have been received in circumstances which import an obligation of confidence
    - there must be actual or threatened misuse of the information.

83. I will therefore consider whether the criteria for founding an equitable breach of confidence can be established.

84. The information may be identified as the information in issue.

85. To my knowledge, the information in issue is not 'common knowledge', nor has it entered the public domain. In my view this is so despite the information set out in appendix 2. I have also borne in mind the limitations on disclosure imposed on the agency and its staff with respect to information concerning interested parties 4, 7, 11, 12, 13, 16, 20 and 24. Accordingly, I am satisfied that the information in issue that appears in columns 2 to 11 and 13 to 16 of each document has the necessary quality of confidence.

86. I am satisfied that the circumstances in which the agency received the information in columns 4 to 6, 9 to 11 and 16 (**the pricing information**) concerning interested parties 4, 7, 11 to 13, 16, 20 and 24 imported an obligation of confidence. In saying this, I have had particular regard to the terms of the original agreements (referred to above), the correspondence that followed the expiration of the original agreements, and the continuity of the relationship with those interested parties.

87. I accept that a written contract or agreement is not a prerequisite to establishing an equitable obligation of confidence. That said, I am not satisfied that the circumstances in which the agency received the remaining information in issue (that is, after excluding the pricing information relevant to interested parties 4, 7, 11 to 13, 16, 20 and 24) (**the residual information in issue**), imported an obligation of confidence in the requisite sense.

88. Commercial relationships do not automatically give rise to an obligation of confidence. In addition, expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation … that greater confidentiality might

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77 *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226 to 227.
78 *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.
79 *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].
80 *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].

be accorded to material than properly reflects the effect of the FOIA'.[81] I do not consider that the confidentiality provision set out in the *Probity and Ethical Procurement Guideline* (**the Guideline**) is sufficient to give rise to such an obligation with respect to the residual information in issue, as claimed by some of the interested parties. It provides:

> - Measures are in place to manage the security and confidentiality of documents, submissions and commercial information (including emails and electronic documents).
> - Confidentiality agreements are formalised prior to commencement of the process for all external participants including advisors/ consultants.
> - Measures are in place to protect the competitive position and intellectual property of bidders and the commercial interests of government.
> - Employees maintain the integrity and security of official information for which they are responsible.

89. The Guideline arguably outlines agencies' best procurement practices. I am not satisfied that the agency turned its mind to the Guideline when it obtained the prostheses listed in the documents, however. In saying this, I have borne in mind the apparent absence of any confidentiality arrangements with interested parties 1 to 3, 5, 6, 8 to 10, 14, 15, 17 to 19, 21 to 23 and 25 to 34, contrary to the second dot-point in the preceding paragraph.[82]

90. I accept that if the other criteria for founding an action for breach of confidence are satisfied, release of the documents under the FOI Act would constitute their misuse.

91. For clause 13(1)(a) to apply, it may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.[83]

92. If detriment is an essential element, my view is that it is easily established. It would be sufficient, for example, to show that disclosure would cause the confider difficulty. I note also that Deputy President Forgie of the AAT commented that detriment:

> … may be that disclosure of information relating to his affairs will expose his actions to public discussion and criticism … [or] the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified.'[84]

93. I accept that disclosure of the pricing information relevant to interested parties 4, 7, 11 to 13, 16, 20 and 24 without their consent, other than in the limited circumstances envisaged in the original agreements, would itself be detrimental to interested parties 4, 7, 11 to 13, 16, 20 and 24.

94. Accordingly, I am satisfied that the documents are exempt under clause 13(1)(a).

95. In my view, it would nevertheless be practicable to provide partial access to the residual information in issue (that is, excluding the pricing information relevant to interested parties 4, 7, 11 to 13, 16, 20 and 24), as envisaged by section 20(4) of the FOI Act.

96. Given my views regarding clause 13(1)(a), I will consider whether or not the residual information in issue is exempt under clause 7(1).

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[81] *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 25 years.

[82] Whether the agency had measures in place with respect to the first, third and fourth dot-points is also unclear.

[83] *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434 at 443. See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44; *N P Generations Pty Ltd v Feneley* [2001] SASC 185, [21]; and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73.

[84] *Re Callejo and Dept of Immigration and Citizenship* (2010) 51 AAR 308, [174].

Clause 7(1)(a)

97. The term 'trade secret' is not defined in the FOI Act.

98. *Re Organon (Australia) Pty Ltd v Department of Community Services and Health*[85] considered criteria that may assist in determining whether information amounts to a trade secret. Accordingly, the following criteria, although not exhaustive, may provide a useful guide:
    - the extent to which the information is known outside the business of the owner of that information
    - the extent to which the information is known by persons engaged in the owner's business
    - measures taken by the owner to guard the secrecy of the information
    - the value of the information to the owner and to his or her competitor
    - the effort and money spent by the owner in developing the information
    - the ease or difficulty with which others might acquire or duplicate the secret.[86]

99. In *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*[87] the Full Federal Court took the view that the term 'trade secrets' 'should be given the meaning well understood in this country'.[88] In addition, the Court cited the following test adopted by Staughton LJ in *Lansing Linde Ltd v Kerr* with approval:
    - the information is used in a trade or business
    - the owner must limit the dissemination of it or at least not encourage or permit widespread publication
    - if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.[89]

100. Applying this test, I accept that the interested parties used the residual information in issue in the course of carrying on their businesses. In addition, it appears that they have limited its dissemination to some extent. I say this having regard to some of their submissions and comments made in the Senate Committee Report. I am not satisfied, however, that disclosure of the residual information in issue would cause real or significant harm to the interested parties. In saying this, I have again had regard to:
    - the time that has elapsed since the residual information in issue was received by the agency[90]
    - the fact that the prices relate to the South Australian public health system, and are limited to products used by the agency
    - the fact that the residual information in issue does not reveal the bases for the pricing information contained therein
    - the formal contracts entered into with a number of interested parties in 2017 in relation to orthopaedic and cardiovascular prostheses.

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85 *Re Organon (Australia) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588.

86 *Re Organon Australia) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588. I note that the Full Federal Court has determined that the information does not need to be of a technical character in order to be considered a trade secret: *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992)108 ALR 163, 172.

87 *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992)108 ALR 163.

88 *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992)108 ALR 163, 172.

89 *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529, per Staughton LJ, 536, cited in *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992)108 ALR 163, 173.

90 Whilst I note some of the interested parties' submissions that their current prices are the same or similar to those charged in the latter half of 2015, I do not consider the residual information in issue to be contemporary having regard to other events affecting the industry, including changes to the minimum cost set by the Prostheses List announced by the Minister for Health and Aged Care in October 2016 (referenced above).

101. Accordingly, I am not satisfied that the residual information in issue is a trade secret or therefore exempt under clause 7(1)(a).

Clause 7(1)(b)

102. In order to satisfy clause 7(1)(b), the document must contain information that has a commercial value to the agency or another person. The terms 'commercial' and 'value' are not defined in the FOI Act, and should be accorded their ordinary meaning.

103. Whether or not the information has a commercial value is a question of fact. However, the Queensland Information Commissioner has considered the phrase and noted that there are two possible interpretations of the phrase:

> The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other 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 commercial value to 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…[91]

104. I generally agree with this view and consider it applicable to clause 7(1)(b).

105. Due to the time that has elapsed since the residual information in issue was received by the agency and the fact that the prices relate specifically to the agency, I have my doubts that:
- a 'genuine arms-length buyer … [would be] prepared to pay to obtain that information' now[92]
- the relevant information is 'important or essential to the profitability or viability of the [interested parties'] continuing business operation[s]'.[93]

106. Nevertheless, given the applicant's interest in the information I accept that it is possible that the applicant or other private health insurers would be prepared to pay for such information.

107. Accordingly, I will consider whether disclosure of the residual information in issue could reasonably be expected to destroy or diminish the commercial value of *that information*.

108. I am not satisfied that disclosure of the residual information in issue could reasonably be expected to destroy or diminish the commercial value of *that information*. In saying this, I have again had regard to:
- the time that has elapsed since the residual information in issue was received by the agency[94]
- the fact that the prices relate to the South Australian public health system, and are limited to products used by the agency

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91 *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [54] - [55], interpreting section 45(1)(b)(i) of the *Freedom of Information Act 1992* which is similar to section 7(1)(b).

92 *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [54] - [55].

93 *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [54] - [55].

94 Whilst I note some of the interested parties' submissions that their current prices are the same or similar to those charged in the latter half of 2015, I do not consider the residual information in issue to be contemporary having regard to other events affecting the industry, including changes to the minimum cost set by the Prostheses List announced by the Minister for Health and Aged Care in October 2016 (referenced above).

- the fact that the residual information in issue does not reveal the bases for the pricing information contained therein
- the formal contracts entered into with a number of interested parties in 2017 in relation to orthopaedic and cardiovascular prostheses.

109. Clause 7(1)(b) also includes a public interest test, which I will consider below.

Clause 7(1)(c)

110. I accept that the residual information in issue concerns the interested parties' business affairs.

111. Regarding the phrase 'could reasonably be expected to have an adverse effect', the District Court has commented that:

> We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects… that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous'…[95]

112. It will be sufficient:

> if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minibus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.[96]

113. I am not satisfied that disclosure of the residual information in issue could reasonably be expected to have an adverse effect on the interested parties' affairs for the reasons set out when considering clause 7(1)(b).

114. I am not satisfied that disclosure of the claimed exempt information could reasonably be expected to prejudice the future supply of *such* information to the Government or an agency. In saying this, I note that the information in issue represents the minimum amount of information necessary for the interested parties to supply and the agency to purchase prostheses. Although South Australia may be a comparatively small market, businesses that have a financial interest in dealing with the government and agencies are, in my view, unlikely to be deterred from contracting with the South Australian government or agencies in the future as a result of disclosure of the residual information in issue. I have also borne in mind the factors set out in relation to clause 7(1)(b).

Clause 13(1)(b)

115. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:
    - that matter in the document was 'received under an express or inferred understanding that [it] would be kept confidential'[97]
    - that disclosure of the matter 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.

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95 *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia* (1985) (No 2) 7 ALD 584 at 590.
96 *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.
97 See *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

116. I am not satisfied that:
- the residual information in issue was received under an express or inferred understanding that it would be kept confidential
- that disclosure of the residual information in issue might reasonably be expected to prejudice the future supply of information to the Government or an agency

for the reasons set out in relation to clauses 13(1)(a) and 7(1)(c), respectively.

Public interest test - clauses 7(1)(b), 7(1)(c) and 13(1)(b)

117. Despite my views above, I will consider whether or not the public interest test has been met.

118. In considering the public interest, I have had regard to the factors and submissions referred to above. Public interest considerations relevant to this matter are:

In favour of disclosure:
- fulfilling the objects of the FOI Act, particularly the public interest in:
  - promoting openness and accountability of the agency and its staff
  - facilitating public participation in the processes involved in the making and administration of laws and policies with respect to the PL framework
- the ongoing relevance of the claimed exempt information to the applicant, and the public more generally
- the time that has elapsed, and events that have occurred, since the documents were created
- related information that is publicly available (for example, information set out in appendix 2 and in the Senate Committee Report)
- expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation … that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA'.[98]

Contrary to disclosure:
- objections to disclosure raised by the agency and various interested parties
- assumptions of confidentiality on the part of various interested parties
- the time that has elapsed, and events that have occurred, since the documents were created.

119. I am not satisfied that disclosure of the residual information in issue would, on balance, be contrary to the public interest. My view is that the public interest in openness and accountability and facilitating more effective participation, the ongoing relevance of the information to the applicant and the public more generally are persuasive factors in this matter, and outweigh the factors against disclosure. In saying this, I have had particular regard to the significant number of Australians who hold private health insurance and the opacity surrounding the PL system, as commented on by both the IWG and the Senate Committee.

120. Accordingly, I am not satisfied that the residual information in issue is exempt under clauses 7(1)(b), 7(1)(c) or 13(1)(b).

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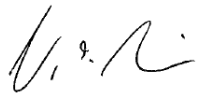
[98] *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 25 years.

Determination

121. In light of my views above, I vary the agency's determination to enable the documents to be released after redacting:
    - the information in columns 4 to 6, 9 to 11 and 16 concerning interested parties 4, 7, 11 to 13, 16, 20 and 24[99]
    - column 1 in its entirety[100]
    - the rows relevant to interested parties 27 and 32.[101]



Wayne Lines
SA OMBUDSMAN

12 December 2017

[99] I consider such information to be exempt.
[100] Column 1 is outside the scope of the narrowed application in its entirety.
[101] The rows relevant to interested parties 27 and 32 are outside the scope of the narrowed application.

OmbudsmanSA

APPENDIX 1 - 2016/08100

Procedural steps

Date	Event
2 February 2016	The agency received the FOI application dated 1 February 2016.
17 February 2016	The agency failed to determine the application within the 30 day period required by the FOI Act,[1] and is deemed to have refused access to the documents.[2]
2 September 2016	The agency received the internal review application dated 1 September 2016.
16 September 2016	The agency varied the determination.
13 to 14 October 2016	The Ombudsman received the applicant's request for external review by facsimile and the Ombudsman's website.
19 to 20 October 2016	By emails, the applicant provided supporting documentation.
24 October 2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
11 to 28 November 2016	Communications occurred between the applicant and Ombudsman SA about clause 13(2) of Schedule 1 to the FOI Act.
13 January 2017	The applicant provided submissions in support of the application by email.
18 January 2017	By letter, the agency provided the Ombudsman with its submissions and documentation.
14 February 2017	The applicant provided further submissions and documentation in support of the application by email.
27 March 2017	By emails Ombudsman SA sought additional information from the agency and applicant.
28 March 2017	Ombudsman SA received additional information from the agency (partial response to 27 March 2017 request) and applicant, by emails.
9 May 2017	Ombudsman SA received some additional information from the agency in response to the 27 March 2017 request.

1 *Freedom of Information Act 1991*, section 14(2).
2 *Freedom of Information Act 1991*, section 19(2).

15 May 2017	Ombudsman SA received oral submissions from the applicant's representatives of the by telephone.
	By telephone and email, respectively, Ombudsman SA sought, and the agency provided, additional information.
	The Ombudsman reiterated previous requests by letter.
5 June 2017	The applicant's representative clarified the scope of their access application.
4 August 2017	By letter dated 3 August 2017, the agency provided its response to the Ombudsman's 15 May 2017 requests.
16 August 2017	By telephone and email, respectively, Ombudsman SA sought and the agency provided information missing from its 4 August 2017 response.
12 September 2017	By emails Ombudsman SA sought and received an electronic version of documents relevant to some interested parties from the agency.
10 October to 17 October 2017	Ombudsman SA sought and received clarification from the agency, by email.
8 November and 9 November 2017[3]	The Ombudsman issued his provisional determination to the parties.
9 November to 28 November 2017	Ombudsman SA liaised with the applicant and interested parties, by telephone and email, about the due date for responses and provided additional information by request.
13 November 2017	Interested party 26 responded to the provisional determination by telephone.
14 November 2017	Interested party 27 provided brief submissions, by telephone, in response to the provisional determination.
	Interested party 7 provided brief submissions, by telephone, in response to the provisional determination.
	By email, Ombudsman SA advised the applicant and two interested parties of the Ombudsman's provisional view that limited additional information within the documents was also exempt.
	Interested parties 16 and 24 responded to the provisional determination in writing.

[3] Interested party 3 was notified of the provisional determination on 9 November 2017. The other parties were notified on 8 November 2017.

15 November 2017	Interested party 20 emailed its preliminary response to the provisional determination.
16 November 2017	Interested party 7 provided its written response to the provisional determination.
17 November 2017	Interested party 10 provided its response to the provisional determination by email.
20 November 2017	By email, interested party 9 responded to the provisional determination.
21 November 2017	The agency emailed its response to the provisional determination.
	Interested party 21 responded to the provisional determination by email.
22 November 2017	Interested party 27 provided its response to the provisional determination by email.
	The applicant emailed its response to the provisional determination.
23 November 2017	By email, interested party 3 responded to the provisional determination.
27 November 2017	Interested parties 5, 8, 12, 13, 20, 22 and 33 emailed their responses to the provisional determination.
28 November 2017	Interested party 20 emailed additional documentation in support of their submissions.
29 November 2017	Interested party 32 responded to the provisional determination by telephone.
1 December 2017	By email, interested party 31 responded to the provisional determination.
4 December 2017	Ombudsman SA sought and received clarification from the agency by email and telephone.
5 December 2017	By email, Ombudsman SA reiterated the invitation for interested party 13 to provide documentation in support of its claims of exemption.
11 December 2017	Interested party 13 emailed additional documentation in support of their submissions.

OmbudsmanSA

APPENDIX 2 - 2016/08100

Examples of prostheses pricing provided by applicant

Examples of prostheses pricing between states include:[1]

Assessment body	Billing code	Device	Sponsor	Public sector price	State	Prostheses List price (2015)
CRT Pacemakers	SJ338	Allure Quadra RF PM3242	St Jude Medical	$6,500	WA	$13,520
				$7,349	Tas	
Coronary Stents	BT107	Pro-Kinetic Energy	Biotronik	$300	Qld	$1,248
				$550	Tas	
Coronary Stents	AY040	XIENCE Xpedition Everolimus Eluting Coronary Stent System	Abbott	$1,300	WA	$3,450
				$1,800	Tas	
Stent Grafts	MQ006	Advant PTFE V12 Stent Graft System	Maquet	$3,059	Qld	$4,185
				$3,560	Tas	
Coronary Stents	BT178	Orsiro	Biotronik	$1,450	WA	$3,450
				$1,600	Tas	

Examples of different pricing between the minimum benefit amounts and public sector pricing include:[2]

Assessment body	Billing code	Device	Sponsor	State	Public sector price	Prostheses List Price (2015) [a]
Vascular Stent	BT132	Pulsar 35 Peripheral self-expanding Nitinol stent system	Biotronik	Qld	$1,200	$2,970
Grafts	MQ029	Intergard W - Woven Straight	Maquet	Qld	$346	$800
Vascular Stents	BT126	Pulsar 18 Peripheral self expanding Nitinol stent system - Self Expandable, <150mm	Biotronik	Qld	$900	$1,800
Grafts	TU045	Gelsoft Plus Graft	Terumo Australia	WA	$845	$1,630
Nephrostomy Catheters	BS228	Flexima Nephrostomy Catheter	Boston Scientific	WA	$15	$120

1 Notes, along with 'category', '%markup' columns, omitted. WA data: sourced from Health Corporate Network website, July 2015. The website no longer makes this information available to the general public. Qld data: available at the URL https://www.health.qld.gov.au/metronorth/information-access/disclosure-log/default.asp. Tas data: available at the URL http://www.dhhs.tas.gov.au/__data/assets/excel_doc/0006/207078/RTI201516-033_-_Documents_in_Full.xlsx.

2 Notes, along with 'category', '%markup' columns, omitted. WA data: sourced from Health Corporate Network website, July 2015. The website no longer makes this information available to the general public. Qld data: available at the URL https://www.health.qld.gov.au/metronorth/information-access/disclosure-log/default.asp. Tas data: available at the URL http://www.dhhs.tas.gov.au/__data/assets/excel_doc/0006/207078/RTI201516-033_-_Documents_in_Full.xlsx.

Neuro Intervention	HW467	Target Detachable Coils	Stryker	Qld	$750	$1,505
Neuro Intervention	HW488	Excelsior SL-10 & Excelsior 1018	Stryker	Qld	$500	$700
Dura defect repair	JJ744	Duraform Dural Graft Implant - 4" x 5" (10x12.5cm)	Johnson & Johnson	Tas	$1,361	$1,890
Skeletal reconstruction	EO083 [e]	APTUS Hand and Foot	Medartis	Qld	$575	$1,402
Upper Limb	LC189 [f]	SMR Reverse Humeral Body with Locking Screw	Lima Orthopaedics	SA[3]	$1,300	$3,500
Posterior Chamber Intraocular Lenses	AO040	TECNIS® Toric 1-Piece IOL	AMO	WA	$460	$1,042
Posterior Chamber Intraocular Lenses	AL032	AcrySof IQ Toric IOL	Alcon Laboratories	WA	$450	$780
Single Chamber ICD [d]	BS280 [g]	DYNAGEN ICD VR DF-4	Boston Scientific	WA	$11,500	$46,510
Coronary Stents	MI037	Resolute Integrity Zotarolimus-Eluting Coronary Stent System	Medtronic	WA	$1,000	$3,450
Dual Chamber ICDs	SJ331	Ellipse DR CD2377-36Q/CD2377-36QC	St Jude	WA	$11,500	$47,880
ICDs with CRT [d]	SJ321	Quadra Assura MP CD3371-40Q/CD3371-40QC	St Jude	WA	$16,000	$52,750
Remote Monitoring System	BT179 [h]	Cardio Messenger II-S 3G	Biotronik	WA	$500	$1,960
Coronary Stents	MC956	Integrity Coronary Stent System	Medtronic	Tas	$400	$1,248
Dual Chamber Pacemakers	BT115	Entovis DR-T	Biotronik	Tas	$5,147	$11,440

[3] SA Orthopaedics data released, with redactions, under FOI (Ref: CALHN/FOI/1516/023)